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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1916.

JOSEPHINE B. LEWIS, EXECUTRIX OF THE ESTATE OF JAMES LEWIS, DECEASED, APPELLANT,
*vs.*
THE UNITED STATES.
No. 197.

APPEAL FROM THE COURT OF CLAIMS.

## APPELLANT'S REPLY BRIEF.

L. RUSSELL ALDEN,
EDWARD F. COLLADAY,
*Counsel for Appellant.*

Union Trust Building, Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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**Reply to Appellees' First Point.**

Appellees' first point in defense is a contention that the office of Surveyor General of Louisiana was discontinued on June 30, 1909, by the item in the Sundry Civil Appropriation Act of March 4, 1909 (35 Stat. 945, 987), which reads as follows:

> "To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing

> pertaining to surveys in the States of Minnesota, North Dakota and Louisiana, caused by the discontinuance of the offices of the Surveyors General in those States, six thousand five hundred dollars."

Appellant has clearly shown the error of this contention in her "Fourth Point on Salary," pages 20 to 25 of her initial brief, to which the attention of the Court is here invited anew. There should be pointed out, however, one or two inaccuracies of statement in appellees' brief which tend to confuse the issue and which, uncontradicted, might suggest a wrong conclusion.

Throughout their argument on their first point, pages 8 to 10 of their brief, appellees proceed upon the assumption that the work of the office of Surveyor General of Louisiana was completed on June 30, 1909. This is not true. As the Secretary of the Interior reported in his estimates to Congress for the fiscal year ending June 30, 1909, "*the public surveys*" in Louisiana were then completed. But the *records* in the office of the Surveyor General were not then completed, for an appropriation was asked and obtained "to complete the unfinished drafting and field-note writing pertaining to surveys" in the State. (See appellees' brief, page 9.) On June 30, 1909, there was, therefore, no such situation in existence as authorized the Secretary of the Interior to discontinue this office under the terms of Section 2218 of the Revised Statutes, for that section requires the surrender to the State of "*all the field notes, maps, records, and other papers pertaining to land titles*" in the Surveyor General's office being discontinued (and the drafting and field-note writing in the Louisiana office was not finished on June 30, 1909, as above shown) and the section authorizes this surrender only whenever *both* the *surveys* and the *records* of the district are completed, not when the surveys alone are completed and the records remain to be fin-

ished. And these records were not finished and turned over to the State of Louisiana, as the record in this case shows, until one year later, to wit, on June 30, 1910, the date upon which appellant contends the office of Surveyor General of Louisiana was actually discontinued under R. S. 2218 and 2221.

The Secretary of the Interior in his estimates for the fiscal year ending June 30, 1909, told Congress that the office of Surveyor General of Louisiana "should be abolished * * * and the records should be transmitted to the State on or before June 30, 1909." (Appellees' brief, p. 9.) Despite this statement, however, he asked and obtained of Congress, in the Sundry Civil Bill, an appropriation for the fiscal year 1909 to 1910 to *complete the work* of the office. The work of the office was not completed and the records thereof were not transmitted to the State of Louisiana until June 30, 1910. It is strained reasoning to claim, as does the Government, that the office was abolished by Congress on June 30, 1909, *before* its work was completed and by the very item in the appropriation bill which provided for its completion. Rather was it abolished *upon* its completion and under the authority of R. S. 2218 and 2221 on June 30, 1910.

## Reply to Appellees' Second Point.

Appellees' second point in defense is that, if Congress did not abolish the office on June 30, 1909, then the Secretary of the Interior did and that his act was the act of the President removing James Lewis from office under Section 2222 of the Revised Statutes, the part whereof material herein provides that:

> "Sec. 2222. Every surveyor general, register and receiver, *except where the President sees cause other-*

> *wise to determine*, is authorized to continue in the uninterrupted discharge of his regular official duties, after the day of expiration of his commission, and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office: * * *" (Italics ours.)

There is no evidence in this case, nor do appellees contend that the President personally took any action or indicated any determination in this matter prior to the attempted ratification later discussed. Appellees, therefore, have to fall back upon the proposition that the act of the head of an Executive Department, in matters which appertain to his duties, is the act of the President. To support this proposition, appellees cite a number of decisions, none of which, however, appellant contends, are applicable to the facts in this case, and which will be discussed and distinguished later in this brief.

Assuming, however, for the moment only, that appellees are correct in their contention that the Secretary of the Interior could legally exercise the power of determination vested in the President by Section 2222, Revised Statutes, and that such exercise of that power would, in contemplation of law, constitute an exercise thereof by the President, let us briefly review the admitted facts in this case to see what action the Secretary of the Interior, or his subordinate, the Commissioner of the General Land Office, took with reference to James Lewis' continuing in the discharge of his regular official duties after June 30, 1909. The action in detail is fully set forth in appellants' initial brief, at pages 2 to 9 thereof.

On December 5, 1908, the Commissioner of the General Land Office wrote to James Lewis a letter, in which said Commissioner stated that it was *proposed to discontinue* the office of Surveyor General of Louisiana on June 30, 1909.

In the estimates submitted to Congress for the service of the fiscal year ending June 30, 1910, the Commissioner of the General Land Office and the Secretary of the Interior omitted to include any estimate for James Lewis' salary.

On May 11, 1909, the Commissioner of the General Land Office wrote to James Lewis:

> "*As the office of the surveyor-general of Louisiana will be permanently closed and discontinued on July 1, 1909*, the records thereof * * * will be turned over to the State of Louisiana when proper provision has been made by the legislature for their safe-keeping * * * as provided by sections 2218, 2220 and 2221, Revised Statutes." (Rec., 12.) (Italics ours.)

On June 16, 1909, the Secretary of the Interior appointed Arthur Gascon

> "custodian of the documents and records pertaining to the office of the Surveyor-General of Louisiana upon the discontinuance of that office * * * to take effect upon July 1, 1909." (Rec., 14.)

On June 17, 1909, the Commissioner of the General Land Office wrote to James Lewis that

> "As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that *it will be necessary to discontinue it after* June 30, next." (Rec., 13.) (Italics ours.)

The Commissioner of the General Land Office, on the same day, sent a clerk from his office to close up James Lewis' office and ship its records to Baton Rouge and directed the custodian mentioned above to take charge of them there and care for them until the State of Louisiana

complied with the sections of the Revised Statutes under which said records were ultimately to be turned over to the State—which event happened one year later. (Rec., 14.)

Now, in the action reviewed above, there is no communication whatever to James Lewis from the Secretary of the Interior, and the communications sent to James Lewis by the Commissioner of the General Land Office contain no announcement to him whatever that it has been determined by anyone—let alone the President—that he shall cease to hold his office after June 30, 1909. The statements of the Commissioner of the General Land Office, to James Lewis are all to the same effect, namely, that his office—not his incumbency of it—would be discontinued on June 30, 1909, although such a discontinuance of the office was not within the power of the Commissioner, the Secretary, or even the President to ordain. The office could be abolished only by act of Congress, and the mere unauthorized announcement to Lewis by the Commissioner of the General Land Office that the office would be discontinued on June 30, 1909, when, in fact, it was not discontinued by law on that date, nor, indeed, until one year later, does not show a determination by the President of the United States, within the meaning of Section 2222, Revised Statutes, that Lewis should cease his incumbency of the office.

In this connection, it should be noted that the reason given Lewis by the Commissioner of the General Land Office as to why the office of Surveyor General of Louisiana would be discontinued on June 30, 1909, was that Congress had omitted to include an appropriation therefor in the appropriation act (see letter of June 17, 1909, Rec., 13), and this explanation should be weighed in the light of the fact that the omission in the appropriation act was due to the omission of the necessary items from the estimates submitted to Congress by the Commissioner.

The President, in fact, is not even mentioned in any of the communications to Lewis referring to the discontinuance of his office, none of the letters Lewis received referring to the subject were sent to him by the Secretary of the Interior, all of them came from the Secretary's subordinate, the Commissioner of the General Land Office, and none of them announced to Lewis that his *incumbency* of the office was to cease. And yet appellees contend that James Lewis was removed from his office by the President, under Section 2222, Revised Statutes, acting through the head of the Interior Department. The weakness of this contention appears most glaringly when viewed in the light of one of the appellees' own cases, cited by them on page 11 of their brief, the case of Truitt *v.* The United States, 38 C. Cls., 398.

That case involved the construction of Section 10 of the Act of April 22, 1898, 30 Stat., 362, which provided that "the President" might assign army officers to staff duty "in his discretion." Claimant was assigned to staff duty by an order stating that "By direction of the Secretary of War" he should report to Major-General Shafter, who should assign him to duty "under the provisions of Section 10, act of Congress approved April 22, 1898, * * *. By command of Major-General Miles." In holding that he was not assigned to duty by "the President * * * in his discretion," the Court said (page 403):

> "There can be no question but that the President may legally act through the head of a department. It may be said in general that while the superintendence of the administration devolves upon the President, he can not be required to become the head of every department for the performance of ministerial acts under his own hand, and such was the effect of the ruling in the case of Williams *v.* The United States (1 How., 290)."

(The Court then reviewed United States v. Eliason, Runkle v. United States and United States v. Fletcher.)

"We have thus referred to these cases to show the extent of the President's power to act through the head of a department, and in every instance—and we are aware of no authority to the contrary—it will be noted the power of the President to thus act was by the head of the department and not by a subordinate.

"The order assigning the claimant to staff duty was issued by Major-General Miles by direction of the Secretary of War, and even if we were to assume that the President could have acted in the premises through General Miles, there is nothing in the order or in the record to show that the President directed the issuance of the order. The order, on its face, purports to have been issued by direction, not of the President, but by the Secretary of War. So there is nothing to show that the President exercised his discretion in the assignment of the claimant to staff duty."

Appellant feels that the points above made answer conclusively appellees' objections to her first cause of action. She wishes, however, to discuss briefly the cases cited by appellees in their brief so as to show that, under no view, can they be held destructive of appellant's position in the case. All of these cases discuss the question of when the act of the head of an Executive Department is the act of the President. In some of them, the hand of the cabinet officer is held to be the hand of the President; in others not. Where is the dividing line? The truth is, that there are some major functions which can be performed only by the President personally and some minor functions which must be left to his official representatives at the head of the various departments for sheer lack of physical capacity in any one man to conduct the business of a whole government personally No one but the President can approve

acts of Congress so as to convert them into laws, or exercise the pardoning power: to hold that the President must personally supervise every withdrawal of land from public entry under the land laws authorizing withdrawals by his order would be ridiculous. It would be foolish to attempt a full definition or classification of these major and minor functions. It is far safer and easier to place each case as it arises. But an analysis of the cases cited by appellees indicates quite clearly what sort of functions are major and what sort minor. Appellant believes that this examination will show that the removal from office of an official, appointed by the President by and with the consent of the Senate and holding office under a commission, is a major function, and, when the statute says such an official shall continue in office "except where the President sees cause otherwise to determine" (R. S. 2222) it means that the President must personally exercise such determination and no other person for him.

Of the cases cited by appellees on pages 11 and 12 of their brief, Truitt *v.* The United States, has been discussed already in this Reply Brief and there shown to be an authority against appellees rather than for them.

In Williams *v.* The United States, appellees' leading case, the President had, in writing, given the Secretary of the Treasury direction to make advances of money, as need arose, in certain classes of cases described in those written directions, and an advance of money by direction of the Secretary of the Treasury, acting under the President's blanket written authorization, was rightly held to have been made "under the special direction of the President," as required by the statute. The case is an authority against appellees rather than for them, the facts showing personal action by the President under the statute.

Bishop *v.* The United States and Runkle *v.* The United

States were both cases involving the Presidential review of courts-martial, the first naval, the second military, the sentences of which, under the statutes involved, could not legally be carried into execution, if they extended to dismissal from the service, until confirmed by the President. In Bishop *v.* The United States, the President wrote "Approved" on the sentence over his signature, and the Court held that to be sufficient evidence that he had personally examined the sentence. In Runkle *v.* The United States, the Secretary of War endorsed his approval upon the sentence, together with the statement that "the President is pleased to remit all of the sentence, except so much thereof as directs cashiering," and issued a General Order announcing that Runkle had ceased to be an officer of the army. It did not appear, however, that the President had personally confirmed the sentence, and, in view of this fact, the Court held that the sentence never became legally effective. It is true that the President's action in reviewing the proceedings of courts-martial is judicial in its nature and not ministerial, but it must also be remembered that his confirmation is required only when the sentence extends to dismissal from the service or death, and that, in holding that such confirmation by the President must be by him personally, the Courts are so construing the statutes involved as to prevent anyone but the President in person removing from office officers appointed by the President personally by and with the advice and consent of the Senate and holding commissions under him. These two cases, if authority for either side in the present case, are authorities in favor of appellant.

Wilcox *v.* Jackson and Wolsey *v.* Chapman were both cases of reservation from sale of public lands which statute provided were not to be sold if reserved from sale by order of the President. In each case the order reserving the lands

from sale was issued by the head of an Executive Department and such order of the Secretary was held to be the order of the President within the meaning of the statute. Clearly the making of numerous reservations from sale of public lands is not a major function, and the power to make them, vested in the President by statute, must, under any reasonable interpretation, be held to be legally exercised when exercised by the Secretary whom the President has made his other self for the detailed management of the Executive Department committed to his charge. The cases are essentially different from that now at issue and are not authorities against appellant's contention.

Maxwell *v.* The United States falls within the same reasoning as the two cases just discussed, though it presents the question involved in weaker form, as the construction of no statute was involved in it. The President can not be expected, in reason, to busy himself personally with every needed little modification of the Army Regulations. That is a minor function: the reason for there being a Secretary of War is that there may be someone to perform such functions for the President. The Court rightly applied to this case the principle that "the acts of the heads of departments, within the scope of their respective duties, are treated as the acts of the President." The facts in this case differentiate it entirely from the case at bar.

In the same class also is Hayden *v.* The United States, which involved an expenditure authorized by the Secretary of the Navy and by him directed to be charged against the emergency appropriation of $50,000,000 for the national defense voted, at the beginning of the Spanish-American War, "to be expended at the discretion of the President." The Court held that the direction of the Secretary of the Navy was an exercise of the Presidential discretion, saying (pages 49-50):

> "The appropriation of the $50,000,000 and the large power granted to the President are clear indications of the legislative recognition of the almost endless task of providing in detail as to the mode and manner of the expenditure of the money appropriated by the statute * * *."

Clearly it was not the legislative intent to require the President to give personal attention to each and every expenditure, however small in amount, that the exigencies of the defense of the nation in time of war with a foreign power might demand. The reason there is a Secretary of the Navy is that, within the scope of his duties, he may relieve the President of the burden of transacting personally such minor functions.

O'Shea *v.* The United States and Jones *v.* The United States, the two remaining cases cited by appellees, are alike in that, in each, the decision of the Court, that the act of the head of the Executive Department in question was the act of the President, was based upon a recital by such head of the department that the President had acted, which recital was held by the Court to be conclusive in the absence of contradictory evidence. No such recital appears in the case at bar, which fact alone sufficiently distinguishes these two cases as not in point on the present case.

In O'Shea *v.* The United States, the letter from the Secretary of War, which claimant alleged constituted his commission as a post-chaplain in the army under a recess appointment, contained the distinct statement that:

> "You are hereby informed that the President of the United States has appointed you post-chaplain in the service of the United States * * *."

In upholding the validity of this letter as a commission, the Court said:

> "This appointment is in the form then used for recess appointments to the Army; the President had the power to make the appointment, and the act of the Secretary (which expressly declares that the President had made the appointment) is conclusive evidence of the fact that it was made."

In Jones *v.* The United States, the question was whether a certain guano island had been set apart as appertaining to the United States within the meaning of an act providing that, under certain circumstances, such islands might "at the discretion of the President of the United States, be considered as appertaining to the United States." The evidence showed that on July 7, 1858, the Secretary of State had written to the Secretary of the Navy that the President, being of the opinion that it was "advisable to exercise the authority vested in him" by the act "directs that you will cause a competent force to repair to that island"; that the commander of the vessel ordered by the Navy Department to the island had written to the Haytian Minister of Foreign Relations that "I am authorized to say to you that the President of the United States is of opinion that, in this case, it is advisable to exercise the authority vested in him by the fifth section of this act"; that the Assistant Secretary of State afterwards wrote to the commercial agent of Hayti at Boston that the protection of the government had been extended to the island under the terms of the act, and that, on December 8, 1859, the Secretary of State had issued a public proclamation to the same effect. On these facts, the Court held that (137 U. S., 217):

> "The power, conferred on the President of the United States by Section 1 of the act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a

> strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President."

Both of the above two cases, as stated before, differ from the case at bar in that, in each, it appeared either affirmatively or presumptively that the President himself had acted, and, there being no contradictory evidence, the statement of the head of the department that such action had been taken was held conclusive of the fact.

To summarize, appellant contends that the power of determination vested in the President by Section 2222 Revised Statutes could only be exercised by him personally, it being a major function involving the removal from office of an official appointed by the President by and with the advice and consent of the Senate and holding under a duly issued commission, that therefore the Secretary of the Interior could not act for the President in determining that James Lewis should cease to hold his office, that even if the Secretary could have done so, he did not do so, since he never addressed any communication to James Lewis or issued any order dealing with his *incumbency* of his office, that, under the decision in Truitt v. The United States, discussed on pages 7-8 of this brief, no subordinate of the head of an Executive Department can act for the President even in those cases in which the head of the department can so act, that none, even, of the communications of the Commissioner of the General Land Office to Lewis deal with Lewis' *incumbency* of his office, but all refer only to an intended abolition of the office itself, which neither the Commissioner, nor the Secretary, nor the President himself could ordain, it requiring a statute for its accomplishment, that

though the Commissioner of the General Land Office and the Secretary of the Interior illegally tried to abolish the office of Surveyor General of Louisiana on June 30, 1909, their action in this respect was void and of no effect, and that the office continued to exist until it was abolished, under the statutes governing such cases, on June 30, 1910, one year later, and that, in short, the rule of law invoked by appellees as destructive of appellant's contentions, has no applicability to the facts of the case at bar, nor are any of the cases cited by appellees authorities against appellant on the agreed facts in this case, but, so far as any of them govern the case at bar, they are authorities in support of appellant's position.

But, it is contended by appellees, the President, by his order of January 9, 1915 (Rec., 14), ratified the act of the Secretary of the Interior and the Commissioner of the General Land Office. His letter of attempted ratification, as set out on page 14 of the Record, is as follows:

> "The Secretary of the Interior.
>
> "Sir: The action of the Interior Department in discontinuing the office of the United States surveyor general for the district of Louisiana from and after June 30, 1909, as shown by the letters of the Commissioner of the General Land Office to James Lewis, surveyor general of Louisiana, dated December 5, 1908, and May 11, 1909, and the appointment by the Secretary of the Interior, under date of June 16, 1909, of Arthur Gascon as custodian of the records of the office of the surveyor general of Louisiana, to take effect July 1, 1909, copies of which letter and appointment are hereto attached, is hereby ratified and confirmed.
>
> "Woodrow Wilson, President."

It will at once be seen that this letter is very precise and limited in its terms and confines the ratification strictly to

the action of the Interior Department as set forth in the two letters of the Commissioner and the order of the Secretary specifically mentioned. It will also be noted that this attempted ratification took place five and one-half years after the date on which the United States contends that James Lewis was removed from office, four and one-half years after the date on which appellant contends his office was terminated under R. S. 2218 and 2221, and over one month after the death of James Lewis was suggested to the Court of Claims (Rec., 11), a variety of post-mortem honor worthy of the custom in Japan.

Without renewing discussion of the question of whether or not the recitals of departmental *intention* as to the discontinuance of the office of Surveyor General of Louisiana, contained in said Commissioner's letters of December 5, 1908, and May 11, 1909, and said Secretary's order of appointment of June 16, 1909, could be construed as a formal order of discontinuance, had the power to make such an order resided in any officer of the Government, it is contended by appellant that the ratification of the President, contained in his said letter above referred to, is beyond his authority and power and, therefore, of no effect, for the reason that neither the President himself nor any of his subordinates possessed originally or has ever possessed any authority or power whatsoever to discontinue or abolish the office of Surveyor General of Louisiana.

It is not contended that the President did not have the power to remove James Lewis from office under Sec. 2222, Revised Statutes, but it is contended that the President never did and never has removed him from office under said R. S. 2222, nor do the communications of the Secretary of the Interior or the Commissioner of the General Land Office even purport to remove James Lewis from office, as an examination of the record in this case shows.

All the communications in question, addressed to Lewis by his superior officers, were to the same effect, namely, that his *office*—not his *incumbency* of it—would be discontinued on June 30, 1909, although such a discontinuance of the office was not within the power of the Commissioner, the Secretary, or even the President to ordain.

Appellees attempt to justify and vitalize the President's attempted ratification upon the authority of the case of Heinzen *v.* U. S., 206 U. S., 370 at 382. But that case is not in point, as an analysis of its holding shows. In the Heinzen case, it was held that Congress had the power to adopt and ratify the previously unauthorized act of the President, in levying and collecting duties on imports into the Philippines, because it had the power originally to enact a law authorizing the exaction of such duties. In the case at bar, it is contended by appellant that the President did not have the authority to ratify the attempted discontinuance of James Lewis' office, since he did not have the power originally to discontinue it. In the Heinzen case, the ratification which the Supreme Court held to be legal was made by act of the legislature—by statute—enacted in due time, whereas in the case at bar the attempted ratification is by act of the executive taken out of time. In the Heinzen case, the ratification and legalization of the unauthorized act was effected by the entire law-making machinery of the Government—the two Houses of Congress and the President—working in conjunction in the enactment and approval of a law: in the case at bar, the ratification of the illegal act and its vitalization into a legal one is attempted to be made by a single branch of the law-making machinery of the Government, *i. e.*, the President of the United States, acting alone and in non-conformity with the established provisions of law on the subject. The President's power under the law was only to remove Lewis from office

and thereby terminate his incumbency of his office, but this was not attempted. What the Commissioner of the General Land Office and the Secretary of the Interior attempted was to terminate, although it was created by statute, the office itself of Surveyor General of Louisiana, by discontinuing the same and this neither of them had the power under the law to do. It is this attempted act on their part that the President has essayed to ratify and validate by his letter of January 9, 1915, and, as the President was without the power to do this act, to abolish this statute-created office, at the time his subordinates attempted it, he can not legalize their attempt by ratification. As said by Mr. Justice Day of this Court, in rendering the dissenting opinion in the recent case of The United States *v.* The Midwest Oil Company *et al.*, 236 U. S., 459 at 505, "The Constitution does not confer upon him (the President) any power to enact laws or to suspend or repeal such as Congress enacts. Kendall *v.* United States, 12 Pet., 524, 613."

For the above reasons, it is submitted that the President's ratification, contained in his letter set forth on page 14 of the Record, is inoperative and of no effect.

**Reply to Appellees' Third Point.**

Appellees' third point is that appellant is not entitled to the fees claimed, because, appellees allege, they were not provided for by statute and were prohibited by Section 1765 of the Revised Statutes.

Appellant has covered these matters fully in her initial brief and here confines herself to inviting the Court's attention anew to the arguments there made upon pages 31 to 43. Appellees' sweeping statement, on page 14 of their brief, to the effect that the act of March 3, 1831, "in particular strikes at the roots of the fee emoluments to the occupant of this office and limits his remuneration to a fixed

salary" must not, however, be permitted to pass unchallenged. The act of March 3, 1831, did not strike at the fee emoluments of the Surveyor General of Louisiana, as is clearly shown on pages 34 to 42 of appellant's brief, and particularly by the acts themselves as they appear in parallel columns on page 39 of that initial brief, and not only do the ordinary principles of statutory construction force this conclusion, but the action of the successive Surveyors General of Louisiana in retaining such fees as their personal property from the date of the creation of the office in 1831 until stopped by the Commissioner of the General Land Office in 1907 and the action of the General Land Office in acquiescing and countenancing such retention throughout all those years confirms it. And to such a situation, R. S. 1765 has no application whatever, as is clearly shown on page 42 of appellant's initial brief.

Respectfully submitted,

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